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Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

JAMES RAYDEE PARHAM,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, DOES A POLICE OFFICER CONDUCT A REASONABLE SEARCH WHEN HE PERFORMS A ROUTINE, PAT-DOWN SEARCH FOR OFFENSIVE WEAPONS OF ONE WHOM HE IS LAWFULLY DETAINING, WHERE THE JUSTIFICATION FOR THE SEARCH IS THE OFFICER'S NECESSARY AND CONTINUED CLOSE PROXIMITY TO THE DETAINEE, RATHER THAN A SUBJECTIVE FEAR FOR HIS PERSONAL SAFETY OR AN ARTICULABLE REASON TO BELIEVE THAT THE DETAINEE IS ARMED?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

JAMES RAYDEE PARHAM,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a

writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in this cause on December 2, 1985, rehearing denied January 17, 1986, leave to appeal denied by the Michigan Supreme Court on May 21, 1986, one justice dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 147 Mich App 358; ___ NW2d ___ (1985), and appended below as Appendix A; the order of the Court of Appeals denying rehearing is unreported, and appended below as Appendix B. The order of the Michigan Supreme Court denying leave to appeal is unreported as yet, and appended below as Appendix C. Michigan Supreme Court Docket No. 78100.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered judgment on December 2, 1985, and denied Petitioner's motion for rehearing on January 17, 1986. The Michigan Supreme Court entered judgment on May 21, 1986. This Court's jurisdiction is invoked under 28 USC Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

". . . No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws."

STATEMENT OF THE CASE

Respondent was bound over for trial on December 7, 1982, on charges of carrying a pistol in a motor vehicle. On February 4, 1983, a hearing was held on Respondent's motion to suppress. Upon hearing the testimony, the trial court denied the motion; however, on February 8, 1983, the court reconsidered its earlier ruling, granted the motion, and dismissed the case.

The arresting officer testified at the suppression hearing that on November 28, 1982, he stopped Respondent for a routine traffic violation. The witness was driving with his partner at about 11:30

p.m., when he observed Respondent driving erratically; at one point, while in the process of changing lanes, Respondent cut off another vehicle, causing the vehicle to brake to avoid a collision. The officers stopped Respondent's vehicle, and approached to investigate; while talking to the Respondent, the witness noticed that Respondent appeared glassy-eyed, and detected the smell of alcohol on Respondent's breath. He ordered Respondent to exit the vehicle and escorted him to the rear to conduct some sobriety tests; before doing so, however, the officer conducted a pat-down search of Respondent, to determine whether he was armed. As a result of the search, the officer found a loaded .22 caliber revolver in Respondent's right front pants pocket.

On cross-examination, the officer

testified that, at the time he stopped the Respondent, he had no reason to believe that he (the Respondent) was engaged in the commission of a felony, but that the sole reason for stopping him was because of the traffic violation -- changing lanes without safe signal or observation -- for which he was issued a traffic citation. The officer further testified that he observed nothing suggesting that his personal safety might be in danger, but conducted the pat-down search as a general precautionary measure to avoid taking any chances. He stated that "I try to be apprehensive for my personal safety on just about everything I do, including traffic stops," but that he did not normally pat a person down for a "mere traffic violation." In this case, he decided to conduct the search because of the traffic violation "[c]oupled with other possible things ...

relative to the operating under the influence."

Ultimately, the Respondent performed the sobriety tests satisfactorily, and "was given the benefit of the doubt relative to the operating under the influence." However, he was arrested and charged with carrying a pistol in a motor vehicle.

On December 2, 1985, the Michigan Court of Appeals affirmed the trial court. In a published opinion, the court held that because the officer could not point to "particular facts from which he reasonably inferred that the [Respondent] was armed and dangerous," but instead "merely conducted the pat down as a routine precautionary measure for his personal safety," the search was illegal, and the lower court had correctly

suppressed the evidence.

On January 17, 1986, the Court of Appeals denied Petitioner's motion for rehearing; and on May 21, 1986, the Michigan Supreme Court denied Petitioner's timely application for leave to appeal.

REASONS FOR GRANTING THE WRIT

While the facts of this case are simple, the constitutional principles involved are far-reaching, affecting the relationship between citizens, and those sworn to uphold the law.

In this case, police observed Respondent driving erratically and ordered him to stop. Detecting the odor of alcohol on his breath, they ordered him out of his car so that they could perform some field sobriety tests. The arresting officer observed nothing to make him think that Respondent might be armed -- and nothing to give rise to subjective fears for his own safety. However, to ensure his own safety -- given the anticipated and extended close proximity between the officer and Respondent for purposes of the sobriety test, and the latter's possibly drunken

state -- the officer conducted a limited, pat-down search for offensive weapons. Thus, the resulting question is whether, and under what circumstances, a police officer may conduct a pat-down search of a person lawfully detained, in the absence of any subjective apprehension, or a reasonably objective basis for fearing for his own safety.

This case does not fit easily within any of this Court's existing precedents. It comes close to the situation in Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977), in which this Court recognized that States have a "legitimate and weighty" interest in the safety of its peace officers; however, after ordering Respondent out of the car, the police observed nothing to make them fearful. It approaches the situation in United States v Robinson, 414 US 218,

234-235; 94 S Ct 467; 38 L Ed 2d 427 (1973), in which this Court recognized the fallacy of assuming that those arrested for minor traffic offenses were less likely to possess dangerous weapons than are those arrested for more serious crimes; but as this Court also noted in Berkemer v McCarty, 468 US ___; 104 S Ct 3138; 82 L Ed 2d 317 (1984), detentions for minor traffic offenses are more akin to Terry-stops than to full custodial arrests. And it appears to come within the rationale of Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), except for the fact that the police officer conducted the search as a precaution, rather than because of anything observed at the time of the detention. However, Terry itself contains words which have long been buried in this country's rush toward the routine suppression of evidence, and

which warrant resurrection by this Court if the concepts of "reasonable search" and "due process of law" are to have any meaning:

> "The exclusionary rule has its liminations as a toll of judicial control.... [In] some contexts the rule is ineffective as a deterrent....Regardless of how effective the rule may be where obtaining a conviction is an important objective of the police, it is powerless to deter...where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.
>
> "Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime." Terry v Ohio, supra at 13-15.

In this case, the trial court based its decision on this Court's precedents in Terry and Ybarra v Illinois, 444 US 85, 108; 100 S Ct 338; 62 L Ed 2d 238 (1979); the Court of Appeals also cited

Pennsylvania v Mimms, supra, as a basis for its affirmance.[1] However, as Justice Rehnquist noted in his dissenting opinion in Ybarra, any rule of law which ignores or denigrates a police officer's "well-honed sense of self-preservation" invites defiance, and hence disrespect for the law. Petitioner submits that any law which also values the convenience of its citizens above the lives of the officers sworn to uphold it has little to

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[1] Ironically, the closest state court case on point is another opinion of the Michigan Court of Appeals -- People v Otto, 91 Mich App 444; 284 NW2d 273 (1979). There, the court held that police about to put a citizen in their squad car in order to give him a ride may conduct a limited pat-down search for their own protection -- despite the fact that he is not under arrest, and the police have no particular reason for suspecting that he may be armed. The court reasoned that -- as here -- the extended proximity of the police to the citizen poses an inherent danger, entitling them to frisk him for their own safety.

Contra: People v Scott, 16 Cal3d 242; 128 Cal Rptr 39; 546 P2d 327 (1976).

commend it; and given the obscene abundance of weapons in American society, any search conducted for the limited purpose of uncovering weapons held by any person whom police may lawfully detain is -- and should be -- reasonable per se.

To the extent that this position conflicts with the current understanding of the Fourth Amendment, Petitioner urges this Court to reconsider it.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the cause for proceedings consistent with this Court's opinion.

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Dated: June 10, 1986

JC/dh

APPENDIX

OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-v-

Dec. 2, 1985
No. 70365

JAMES RAYDEE PARHAM,
Defendant-Appellee.

Before: M. J. Kelly, P.J., and R. S. Gribbs and M. R. Knoblock*, JJ.
M. Richard Knoblock, J.

Defendant was charged with carrying a pistol in a motor vehicle, MCL 750.227; MSA 28.424. After a hearing, the trial court suppressed the weapon from use as evidence and dismissed the case. The people appeal.

Defendant was operating his motor vehicle on a public street in the City of Detroit at approximately 11:30 in the evening when police officers observed him changing lanes without signaling, causing

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*Circuit judge, sitting on the Court of Appeals by assignment.

another driver to brake to avoid a collision. The police followed and pulled the vehicle over after observing defendant change lanes two additional times without signaling. One of the officers approached the vehicle and requested defendant's driver's license and vehicle registration. While doing this, the officer detected a slight odor of alcohol and noticed the defendant's eyes appeared to be glazed. The officer decided to perform certain field sobriety tests on defendant and requested he exit the vehicle for this purpose, to which he complied.

Prior to performing the tests, the officer conducted a pat-down search of defendant and found a loaded 22-caliber pistol in his pants pocket. Defendant passed the field sobriety tests to the officer's satisfaction, but was arrested

and charged with illegal possession of the pistol.

At the hearing on the motion to suppress, the arresting officer testified that he saw nothing in defendant's actions or appearance that made him suspect defendant was armed but that he conducted the pat-down search as a general precautionary measure. The trial court ruled that the pat-down search was an unreasonable search and seizure in violation of the Fourth Amendment. We agree.

Since at the time of the patdown, the defendant was not under arrest, nor was there probable cause for an arrest, our decision in this case is governed by the "stop and frisk" rules enunciated in Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 889 (1968), and its progeny. Terry requires the application of a two-pronged

test; whether under the factual circumstances that existed at the time of the pat-down search the police officer 1) reasonably concluded that criminal activity may be afoot, and 2) reasonably concluded that the person with whom he is dealing may be armed and dangerous. In determining the reasonableness of these conclusions due consideration must be given not to the officer's unparticularized suspicion or hunch, but to specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Terry, supra, p 909. The police officer must be "able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." Sibron v New York, 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968). No such facts appear in the record. The officer testified that he made no observation which aroused his suspicion that the defendant was armed,

but merely conducted the pat down as a routine precautionary measure for his personal safety.

We find meritless the people's claim that their position is supported by Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 331 (1977), which on the contrary serves to underline the flaw in their case. In Mimms, after stopping a vehicle which was observed to have expired license plates, the police officer ordered the driver out of the vehicle. When the driver alighted, a large bulge in his coat was observed, which caused the police officer to suspect he was armed. Upon conducting a pat-down search, it was discovered the driver was unlawfully in possession of a firearm. The court held that once the police officer had legitimately stopped the vehicle, he had the right, without more, to order the driver to exit the

vehicle and that the bulge in the jacket permitted the officer to reasonably suspect that he was armed and dangerous. The court observed that under these circumstances, any person of reasonable caution would likely have conducted a pat down. It is the absence of any factual basis from which the police officer could reasonably suspect the defendant was armed that distinguishes this case from Mimms and compels us to conclude that this search and seizure is unreasonable.

In so holding, we are mindful of the public interest in not requiring police officers to take unnecessary risks in the performance of their duties. Terry v Ohio, supra, p 907. However, assessment of the reasonableness of police conduct depends on a balance between this public interest and the individual's right to personal security free from arbitrary interference by law officers. Pennsyl-

vania v Mimms, supra. Having applied this balancing test, we are convinced that policy should be required to employ such other less intrusive measures as may be available for their own safety.

Affirmed.

/s/ M. Richard Knoblock

/s/ Roman S. Gribbs

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-v-

No. 70365

JAMES RAYDEE PARHAM,
Defendant-Appellee.

Before: M. J. Kelly, P.J., and R. S. Gribbs and M. R. Knoblock*, JJ.
M. J. Kelly, P.J. (Concurring).

I concur because I find no error in the trial court's ruling. The suppression order was not clearly erroneous. People v Burrell, 417 Mich 439, 448; 339 NW2d (1983).

/s/ Michael J. Kelly

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* Circuit Court Judge, sitting on the Court of Appeals by assignment.

COURT OF APPEALS ORDER DENYING MOTION FOR REHEARING

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 17th day of January in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable
MICHAEL J. KELLY

Presiding Judge
ROMAN S. GRIBBS
M. RICHARD KNOBLOCK

Judges

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-v- No. 70365
L.Ct.No. 82-07980

JAMES RAYDEE PARHAM,
Defendant-Appellee.
_____/

In this cause a motion for rehearing is filed by plaintiff-appellant and no answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

(seal)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 28th day of January in the year of our Lord one thousand nine hundred and eighty six

/s/ Ronald L. Dzierbicki
Chief Clerk

ORDER OF THE MICHIGAN SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 21st day of May in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

SC: 78100

v COA: 70365

LC: 82-07980

JAMES RAYDEE PARHAM,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it

is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Riley, J., would grant leave to appeal.

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 21st day of May in the year of our Lord one thousand nine hundred and eighty-six.

(seal)

/s/ Corbin R. Davis Clerk